STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
CRESCENZIO DIAZ	:DETERMINATION DTA NO. 812430
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1984 through August 31, 1988.	:

Petitioner, Crescenzio Diaz, 86-23 Eton Street, Jamaica Estates, New York 11423, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1984 through August 31, 1988.

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 19, 1994 at 1:15 P.M., with all briefs to be submitted by January 19, 1995. Petitioner was represented by Alvin Silverman, C.P.A. The Division of Taxation was represented by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel).

ISSUE

Whether petitioner's request for a conciliation conference, which he concedes was made later than 90 days after the issuance of the notices of determination, is nevertheless effective to obtain a review on the issue of whether the assessment was timely made.

FINDINGS OF FACT

(a) East 170th Food Corporation of 308 East 170th Street, Bronx, New York was the owner of a grocery store doing business as Met Food. The business was owned by petitioner Crescenzio Diaz's wife.

(b) Petitioner, Crescenzio Diaz, was either the president or manager of the business during most or all of the period under review.

(c) All of the business's sales tax returns were timely filed. The business was sold (by sale of stock) to a Mr. George Horton. Petitioner claims the sale occurred on June 28, 1988.[1] However, Mr. George Horton was contacted at the business location by the auditor on March 20, 1990, according to the auditor's log. Previous contacts with the business had been with Mr. Fine, the accountant for the business.

In 1991, Alvin Silverman became the representative of both the business and Mr. Horton, who owned the business at that time. (Mr. Silverman began representing petitioner in 1993.)

A series of consents extending the period of limitations for assessment, which petitioner denies signing though they bear his name, were dated November 10, 1987, February 5, 1988, February 8, 1988, September 7, 1988, November 10, 1988, February 23, 1989, April 25, 1989 and December 18, 1989. In support of his denial of signing the consents, petitioner states that he was not even in the store after its sale in June 1988.

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[1]Petitioner's representative has submitted no legal papers to show this date, although he was asked to do so.

It is noted that, although petitioner's name appears on the consents, each of the signatures appears to be in a different handwriting from the others. The auditor's log shows no contact with petitioner by name or any awareness of his post-1987 home address on Eton Street. The last consent extended the limitation period to June 20, 1990.

(a) A Notice of Determination, dated May 15, 1990 and an identical notice dated August 14, 1990, were issued to petitioner as an officer of East 170th Food Corporation d/b/a Met Supermarket for the period September 1, 1984 through February 29, 1988. The tax due was $65,873.99, plus penalty of $18,938.10 and interest of $39,840.35, for a total amount due of $124,652.44.

(b) An additional Notice of Determination, also dated May 15, 1990 and redated August 14, 1990, were issued to petitioner for the period March 1, 1988 through August 31, 1988 for tax due of $7,529.54, plus penalty of $2,216.34 and interest of $1,770.22, for a total amount due of $11,516.10.

(c) A third Notice of Determination, dated May 15, 1990 and redated August 14, 1990, were issued to petitioner for the period June 1, 1985 through August 31, 1988 for a penalty of $5,692.14.

These notices against petitioner were issued after a field audit of the business, East 170th Food Corporation.

(a) The notices dated May 15, 1990 were sent to petitioner as an "officer" of East 170th Food Corporation at

184-09 90th Avenue, Jamaica, New York 11423. Petitioner had lived at that address in Hollis, New York prior to 1988. These notices were returned to the Division of Taxation ("Division") for a better address. The Division does not claim that this was proper mailing.

(b) The mailing of the August 14, 1990 notices was to petitioner as "officer of East 170th Food Corp." at his home address on Eton Street, the same address as on petitioner's 1987 and 1989 personal income tax returns. To demonstrate proper mailing the Division submitted the affidavits of William C. Ridderwold, Daniel LaFar and Charles Brennan, all Division employees, as well as postal forms 3877 and certified mailing records. It is the timeliness of these notices that is contested by petitioner. At the time of receipt, petitioner and his accountant treated the notice as a nullity; they never consented to it.

A warrant was issued against petitioner on March 30, 1993 for the amounts of tax due of $65,873.99 and $7,529.54, plus penalty and interest, for a total due of $183,086.83.

(a) A request for conciliation conference, dated June 10, 1993, was mailed to the Division by certified mail on June 11, 1993. This request (as well as the later petition to the Division of Tax Appeals) clearly states that petitioner was not an officer of East 170th Food Corporation at the time of the signing of the consents to extend the limitations period, that he did not sign them, and that the "statute of limitations expired."

(b) The request was denied by a Conciliation Order dated August 27, 1993 as filed later than 90 days after the issuance of the notices of determination.

A petition certified by the U.S. Postal Service on November 23, 1993 was received by the Division of Tax Appeals on Friday, November 26, 1993, within 90 days of the Conciliation Order of August 27, 1993.

CONCLUSIONS OF LAW

A. A petition for a hearing may be filed to review the order of a conciliation conferee denying the request for a conference. Such a review is authorized by Tax Law § 170(3-a)(e) where a petition is filed within 90 days of the Conciliation Order. This time limit was met by petitioner since the postmark on the certified letter was within 90 days of the Conciliation Order (see, Tax Law § 1147[a][2]).

B. (1) The authority to assess officers of a corporation for the corporation's sales taxes appears in the Tax Law. The determinations for most of the tax quarters here in question were made under Tax Law § 1138(a)(3)(B) enacted by Laws of 1985 (ch 65, § 82). Determinations for the earlier tax quarters were made under Tax Law § 1138(a)(1) and since assessments of tax due were made after an audit finding the tax returns to be deficient, the notices were permissible (Matter of Arthur Treacher's Fish & Chips v. New York State Tax Commn., 69 AD2d 550, 553, 419 NYS2d 768; Gage v. State Tax Commn., 73 AD2d 635, 422 NYS2d 757).

(2) Based on petitioner's testimony and the differences

in the signatures on the consents there is some doubt in this case whether the notices of determination of tax due were timely issued against this petitioner. Tax Law § 1147(b) provides that:

> "no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of the return . . . ."

In this respect, it can be noted that an extension of a limitation period signed by an officer of a corporation cannot affect a former officer of the corporation who was not in any way affiliated with the corporation at the time the waiver was executed (Matter of Rossi, State Tax Commn., September 16, 1983 [TSB-H-83(216)S]. Despite this, however, the statute of limitations argument is an affirmative defense which can only be addressed if there is jurisdiction to decide the merits of the case in the first place.

C. (1) A notice of determination which is not petitioned within the requisite time period is final and binding. A late protest is of no avail. The Tax Appeals Tribunal has so held (Matter of Lovler, January 6, 1994). It may be true that at one time the Division may have taken the position, with respect to the similar language of the former personal income tax under Article 16 of the Tax Law (Tax Law former § 373[1]), that a late assessment would be void without need for objection by the parties (see, Opinion of Counsel, December 4, 1967, 1967 NY Tax Bulletin, vol 4, p. 67; New York Tax Reporter [CCH] 1966-1968 transfer binder ¶ 99-100). However, the former State Tax Commission clearly did not continue that policy. Rather, it

construed the assessment provisions to be merely procedural and capable of being waived by the taxpayer either intentionally or accidentally. If an affirmative objection is not timely made, then the assessment has the taxpayer's consent. That policy has been upheld by the courts under the sales and use tax (Matter of Servomation Corp. v. State Tax Commn., 60 AD2d 374, 400 NYS2d 887). That case found support for its position in suits for Federal income taxes, citing the dictum that a limitations defense is an affirmative defense under the Federal Rules of Civil Procedure and is not "jurisdictional". This doctrine has been followed by the U.S. Tax Court (Badger Materials v. Commr., 40 TC 1061, 1063). To be distinguished is the situation where a Notice of Deficiency is timely mailed but which contains an incorrect address or where there is a failure to use certified mail (when the notice does not reach the taxpayer in time to file a petition). Those defects violate the express terms of the statutory provision authorizing the notice (26 USC § 6212) and are considered to be "jurisdictional" and thus can be raised by a petition which is otherwise late filed (Shelton v. Commr., 63 TC 193). In that case, the court said that to decide that a petition to the court was timely first required that it be found that the Notice of Deficiency was valid. The Tax Appeals Tribunal has followed that position (see, Matter of Blau Par Corporation, Tax Appeals Tribunal, May 21, 1992). However, I must note that under Federal procedures the taxpayer can attack the timeliness of the assessment in a later judicial action to enforce or cancel tax liens (United States v. Dubin, 250 F Supp

197, 66-1 US Tax Cas [CCH] ¶ 9194; Pipola v. Chicco, 274 F2d 909, 912-913, 60-1 US Tax Cas [CCH] ¶ 15,276; United States v. Szerlip, 169 F Supp 529, 59-1 US Tax Cas [CCH] ¶ 9253). "[W]hen the Government seeks the aid of the courts in enforcing the assessment in any form, it opens the assessment to judicial scrutiny in all respects" (United States v. O'Connor, 291 F2d 520, 527, 61-2 US Tax Cas [CCH] ¶ 9495).

(2) It is not relevant that the policy with respect to an untimely petition by the taxpayer for a hearing is not the same. If a petition for a hearing on a sales tax determination is late, an objection thereto can be made at any time. There is no time limit. The sales tax determination:

> "shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing . . ." (Tax Law § 1138[a][1], [3]).

This language has been construed to mean that the Division of Tax Appeals, to which the challenge is made, does not have jurisdiction unless the petition is filed within the requisite 90 days. Since it is the jurisdiction of the Division of Tax Appeals which is involved, this bar is absolute. It cannot be waived by the parties, either by action or inaction (through I note that the Commissioner of Taxation and Finance can redetermine the tax on his own motion [Matter of Halperin v. Chu, 138 AD2d 915, 526 NYS2d 660]). The rationale for this result is that, as here, the drafters of the statute granting the right in question have included the time limitation in the same provision that grants the right (see, People ex rel Office

of Rent Administration v. Berry Estates, 87 AD2d 161, 450 NYS2d 845, 856-857, affd 58 NY2d 701, 458 NYS2d 905; Matter of Oblensky v. Division of Human Rights, 67 AD2d 1069, 413 NYS2d 788).

(3) Tax Law § 2006(4) does not aid petitioner. That section provides that there is a right to a hearing unless a right to a hearing is "specifically provided for, modified or denied" by another provision of the Tax Law. A limitation on such a right appears explicitly in the provisions of Tax Law § 170(3-a)(e), granting a right to a conference where there is a timely filed request, as well as in Tax Law § 2006(4) itself which limits such right to a timely filed petition.

D. There may or may not be other remedies for the taxpayer in this case. While a claim for refund after payment of the tax on the facts of this case would appear to be out of the question (Matter of Sheppard-Pollack, Inc. v. Tully, 64 AD2d 296, 409 NYS2d 847), it may be that a common law suit for refund could be brought (Matter of Allied Aviation Service Co. of N.Y., Tax Appeals Tribunal, June 27, 1991; First National City Bank v. City of New York Finance Administration, 36 NY2d 87, 365 NYS2d 493). A declaratory judgment action is severely limited (McLean v. Jephson, 12 NY 142; Matter of Hospital Television Systems v. New York State Tax Commn., 41 AD2d 576, 339 NYS2d 603; Horner v. State of New York, 107 AD2d 64, 485 NYS2d 595). I can take no position on those matters. Even if they are unavailable, however, that would not change the provisions of the Tax Law with respect to the jurisdiction of the Division of Tax Appeals.

E. The request for a conference was not timely. The conferee was correct in dismissing the request. Conferences are authorized only where the taxpayer has a right to a hearing and "if the time to petition for such a hearing has not elapsed" (Tax Law § 170[3-a][a]). In this case, the 90-day period under Tax Law § 1138 to petition for a hearing had as stated above clearly elapsed. The mailing documents submitted by the Division prove the notices were mailed on August 14, 1990 and petitioner does not contest this. It is equally clear that the request for conference was not filed until June 11, 1993. The conferee, therefore, had no authority to rule on the timeliness of the notice of determination. The Division's answer to the petition objecting to the late request for conference is properly taken.

F. The petition of Crescenzio Diaz is dismissed.

DATED: Troy, New York
July 6, 1995

/s/ Nigel G. Wright

ADMINISTRATIVE LAW JUDGE